

89-534

No. 89-

Supreme Court, U.S.

FILED

SEP 26 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FOXMEYER CORPORATION,
FOXMEYER - TBL, INC. and
FOXMEYER INFORMATION SYSTEMS, INC.,
Petitioners,

v.

STONE'S PHARMACY, INC.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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40 pp



QUESTION PRESENTED

Whether an action for the benefit of a bankrupt debtor and involving property of the bankruptcy estate should be brought by the trustee in bankruptcy (as the Fifth and Tenth Circuits require) or by a single creditor outside of the bankruptcy proceeding (as the Eighth Circuit allows).

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FOR THE EIGHTH CIRCUIT**

Petitioners, FoxMeyer Corporation, FoxMeyer-TBL, Inc. and FoxMeyer Information Systems, Inc. (collectively, "Fox-Meyer") hereby file this Petition For a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 22, 1989, which reversed a decision by the United States District Court for the Eastern District of Arkansas and remanded the case to the District Court for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 875 F.2d 655 and reproduced in the Appendix hereto (App. 1a-6a). The opinion of the District Court is not reported but is reproduced in the Appendix (App.8a-17a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1989. The order of the Eighth Circuit denying rehearing was entered on June 28, 1989 (App.7a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States Bankruptcy Code of 1978 (as amended) 28 U.S.C. § 1334(d)(West Supp. 1989) provides as follows:

The district court in which a case under [the Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Section 541 of the Bankruptcy Code (Title 11) provides as follows:

(a) The commencement of a case under section 301,302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541 (West 1976).

Section 362 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301,302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C.

78eee(a)(3)), operates as a stay, applicable to all entities, of—

* * *

(3) Any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate.

11 U.S.C. § 362 (West Supp. 1989)

Each of these federal statutes is implicated by the decision rendered below. Likewise, the Bulk Transfers Act, as adopted in Texas, TEX.BUS. & COM.CODE ANN. § 6.101 *et seq.* (Vernon 1968), is involved in this dispute.

STATEMENT

FoxMeyer seeks review of the decision by the United States Court of Appeals for the Eighth Circuit which reversed the District Court's judgment. FoxMeyer contends that the trial court properly dismissed the claims brought against FoxMeyer by Respondent, Stone's Pharmacy, Inc. ("Pharmacy"), under the Texas Bulk Transfers Act and for tortious interference against FoxMeyer. FoxMeyer further contends that the decision by the Eighth Circuit will — in distinction to decisions in the Fifth and Tenth Circuits — create tremendous problems with the jurisdiction of the bankruptcy courts.

Pharmacy is an Arkansas corporation which runs a pharmacy in Jonesboro, Arkansas. This dispute had its genesis in Pharmacy's purchase of a computer and a maintenance contract for that computer from Pharmacy Accounting Management, Inc. ("PAM"), a Texas corporation headquartered in Dallas, Texas. From the outset, Pharmacy had difficulty with the computer and never was able to use it as intended. On January 17, 1985 (approximately six weeks after Pharmacy's purchase of the computer), FoxMeyer purchased a portion of PAM's assets, including a portion of its inventory. FoxMeyer purposely did not purchase

other inventory related to the computer system that Pharmacy bought because FoxMeyer believed the system was technically unstable.

In February, 1985, Pharmacy filed a diversity action in the United States District Court for the Eastern District of Arkansas against PAM and FoxMeyer, alleging that PAM had breached its contract with Pharmacy and that PAM had committed fraud in connection with the sale of the computer. Pharmacy also alleged that the transaction between FoxMeyer and PAM violated the Bulk Transfers Act and that FoxMeyer had tortiously interfered with Pharmacy's contract with PAM.

Shortly after Pharmacy filed suit in Arkansas, however, PAM filed for bankruptcy on March 6, 1985 under Chapter 7 of the Bankruptcy Code in the Northern District of Texas, Dallas Division. Daniel J. Sherman was appointed trustee over PAM's bankruptcy estate on March 14, 1985. Approximately one month later, Pharmacy filed its "Proof of Unsecured Claim" in PAM's bankruptcy, seeking the exact same damages that it sought from FoxMeyer in the Arkansas suit. Shortly after filing its Proof of Claim, Pharmacy filed a motion to lift stay in the bankruptcy court in Dallas seeking permission to pursue its claims against PAM in Arkansas. The bankruptcy court denied Pharmacy's motion, and the automatic stay continued in effect. However, Pharmacy continue to prosecute its claims against FoxMeyer in the Arkansas suit.

After considerable discovery in the Arkansas case, FoxMeyer filed a motion for summary judgment based on grounds unrelated to this appeal. That motion was granted, but the summary judgment was ultimately reversed by the Eighth Circuit. See *Stone's Pharmacy, Inc. v. Pharmacy Accounting Management, Inc.*, 812 F.2d 1063 (8th Cir. 1987) ("*Stone's Pharmacy I*").

In May, 1985, PAM's trustee (Daniel J. Sherman) also filed a Bulk Transfers Act claim in the PAM bankruptcy proceedings in Dallas. This action was brought against FoxMeyer, seeking to avoid the transfer and a return of the property or its value.

In February, 1986, PAM's trustee brought another adversary proceeding against FoxMeyer in bankruptcy court in Dallas for *conversion* of the majority of PAM's assets and for violations of 18 U.S.C. § 1961 *et seq.* ("RICO"). Apparently realizing the factual inconsistency in his two lawsuits,¹ PAM's trustee moved to dismiss the Bulk Transfers Act claim against FoxMeyer. Sherman stated in his motion that "it is in the best interest of the bankrupt estate that this bulk sales act cause of action in this court be dismissed." On September 22, 1987, the District Court in Dallas (J. Fish presiding) dismissed the PAM trustee's Bulk Transfers Act claim. However, neither the trustee nor the District Court in Dallas did anything to stop or stay Pharmacy's action in Arkansas.

FoxMeyer then filed a second motion for summary judgment and a motion to dismiss or, in the alternative, to enforce the stay in the District Court in Arkansas. In both motions, FoxMeyer requested the trial court to terminate Pharmacy's lawsuit on the grounds that Pharmacy was asserting a claim or attempting to recover property belonging to PAM's bankruptcy estate. Although the trial court initially overruled those motions, it ultimately dismissed Pharmacy's claims, without prejudice, on these very grounds. App.8a-17a.

Pharmacy appealed this dismissal to the Court of Appeals. On appeal, the Eighth Circuit reversed the trial court's dismissal and held that the Bulk Transfers Act claim brought by Pharmacy does not implicate PAM's bankruptcy proceeding and that, therefore, Pharmacy could pursue the claim. *Stone Pharmacy, Inc. v. Pharmacy Accounting Management, Inc.*, 875 F.2d 655 (8th Cir. 1989) ("*Stone's Pharmacy II*"). However, the Eighth Circuit also ruled:

¹In the trustee's original action, he alleged that PAM had transferred a major part of its inventory to FoxMeyer. In the second proceeding, PAM's trustee alleged that PAM had sold only a small percentage of its inventory to FoxMeyer and that FoxMeyer had converted the remainder.

If the district court finds that a violation of the Bulk Transfers Act did occur, it should order a gathering of the assets (or their value) to be held until the rights of PAM's creditors, including Stone's Pharmacy, have been determined in the appropriate forum.

Id. at 667.

In its opinion, the panel failed to define what was the "appropriate forum." Presumably, the Court of Appeals meant that the bankruptcy court in Dallas was the "appropriate forum" to determine the rights of all PAM's creditors.

REASONS FOR GRANTING WRIT

In many bankruptcies, the bankrupt debtor accuses some company or individual of wrong doing that ultimately contributed to the demise of the debtor. For example, the debtor claims that someone denuded assets of the debtor, breached contracts of the debtor, or tortiously interfered with bankrupt debtor's business. The question presented here is *who* should bring such claims against the alleged wrongdoer? Should the trustee in bankruptcy bring the claims in the bankruptcy forum (as held by the Fifth and Tenth Circuits) or should an individual creditor be allowed to bring an individual action in a separate forum (as held below by the Eighth Circuit)? The resolution of this question may have an enormous impact on present and future bankruptcy proceedings. Because there is presently a division between the Circuits, these types of lawsuits are being brought by *both* trustees and creditors. The result is duplicate litigation, waste of judicial resources, and the real possibility of conflicting adjudications.

I.

THE EIGHTH CIRCUIT AND THE FIFTH AND TENTH CIRCUITS DISAGREE ON A FEDERAL BANKRUPTCY ISSUE THAT DEMANDS UNIFORMITY.

On the fundamental question of who may bring claims belonging to or involving property of a bankruptcy estate, the Eighth Circuit has broken ranks with other courts of appeal. The Eighth Circuit has held that an unsecured creditor, as an unsupervised class representative, may bring a cause of action that belongs to or involves property of the bankruptcy estate (in this case a Bulk Transfers Act claim) and may seek to assemble assets, which allegedly belonging to the estate, on behalf of all creditors outside of the bankruptcy proceeding. In the Fifth Circuit and Tenth Circuit, only the bankruptcy trustee has standing to assert

such claims and only the bankruptcy court has jurisdiction over such claims. See *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983); and *Delgado Oil Co. v. Torres*, 785 F.2d 857 (10th Cir.) *cert. denied*, 479 U.S. 950 (1986).²

A. STONE'S PHARMACY'S CLAIMS BELONG TO OR INVOLVE PROPERTY OF PAM'S BANKRUPTCY ESTATE.

The Eighth Circuit's opinion acknowledges that the Bulk Transfers Act claim asserted by Pharmacy is a claim belonging to or involving property of PAM's bankruptcy estate. The Court of Appeals has also recognized that the PAM bankruptcy estate is being administered in Dallas and that Dallas is the appropriate forum in which to determine the rights of PAM's creditors. Indeed, that is why the Court recognized that any finding of a Bulk Transfers Act violation would require the district court in Arkansas to assemble the assets or their value for the benefit of PAM's creditors. *Stone's Pharmacy II*, 875 F.2d at 667.

1. The Automatic Stay Applies To All Fraudulent Conveyance-Type Claims.

The language of the automatic stay and the definitions of "property of the estate" mandate the "remedy" that the Eighth Circuit described. As this Court is well aware, the filing of a petition in bankruptcy "operates as an automatic stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate." 11 U.S.C § 362(a). For the purposes of this case, the question then becomes "what constitutes the property of the bankruptcy estate?"

Section 541(a)(1) defines the property of the estate as all "legal and equitable interest of the debtor in property." Included

²The Second Circuit also apparently accepts this proposition as true. See *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037 (2d Cir. 1986).

within this definition are intangible "rights of action". *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983). The Fifth Circuit has declared that the automatic stay prevents parties from asserting claims "belonging to" the bankruptcy estate. In *MortgageAmerica, supra*, a creditor of a bankrupt debtor brought various state law claims against a former insider of the debtor corporation. The creditor's claims were based on the "corporate trust fund" and "denuding" theories and on Texas's fraudulent transfers statute, Tex. Bus. & Com. Code § 24.02-.03 (Vernon 1968). The district court in that case held that these claims "belong to the estate" and, thus, were subject to the automatic stay.

On appeal, the Court of Appeals affirmed the trial court's dismissal. The Fifth Circuit first reviewed the theories underlying these various state law claims in light of the purpose and scope of the automatic stay provision. In its analysis, the panel in *MortgageAmerica* concluded that the corporate trust fund and denuding theories are "derivative" in nature (much like a shareholder derivative action) and are, therefore, "rights of action" belonging to the bankruptcy estate. *Id.* at 1271. The Court of Appeals further concluded that the Texas law regarding fraudulent conveyances essentially permitted creditors to disregard fraudulent conveyances and levy on the debtor's property. Accordingly, the Court stated as follows:

The transferee may have colorable title to the property, but the equitable interest—at least as far as the creditors (not the debtor) are concerned—is considered to remain in the debtor so that creditors may attach or execute judgment upon it as though the debtor had never transferred it.

Id. at 1275.

Once the appellate judges reached these conclusions about the true character of the claims in *MortgageAmerica*, they could

reach no other conclusion about the effect of the automatic stay on these claims.³ The Court of Appeals, therefore, affirmed.

2. Pharmacy's Bulk Transfers Act Claim Is Property of PAM's Bankruptcy Estate And Within The Scope Of The Automatic Stay.

As the Eighth Circuit apparently acknowledges, Pharmacy's Bulk Transfers Act claim fits squarely within the types of claims that the Fifth Circuit held were stayed pursuant to the automatic stay provision. Indeed, an examination of the remedial structure of the Bulk Transfers Act permits no other conclusion. Section 6.105 of that Act provides as follows:

In addition to the requirements of the preceeding section, any bulk transfer subject to this article except one made by auction sale is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in a manner and to the persons hereafter provided.

Tex. Bus. & Com. Code Ann. § 6.105 (Vernon1968)

Like the state law fraudulent transfer claim that the Fifth Circuit analyzed in *MortgageAmerica*, the Bulk Transfers Act is designed to preserve the assets or their value for the benefit of all creditors. See *Southwestern Drug Corp. v. McKesson & Robins*, 141 Tex. 366, 172 S.W.2d 485, 487 (1943). The transferee's liability is that of a receiver; the creditors, therefore, may obtain a judgment against the transferor or may disregard a noncomply-

³The Fifth Circuit in fact has reached the same result with respect to alter ego claims against a bankrupt. See *In re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987)

ing transfer by levying on the assets or their value in hands of the transferee. *Id.*; see also *Anderson & Clayton v. Ernest*, 610 S.W.2d 846, 848 (Tex. Civ. App.—Amarillo 1980, no writ).⁴

Pharmacy's claim under the Texas Bulk Transfers Act depends on a continuing property interest or right by PAM in the inventory that was transferred. That cause of action is owned by or involves property of PAM's bankruptcy estate because, in order to prevail, Pharmacy must, in effect, show a "continuing property interest" of PAM in the transferred property.

Pharmacy's tortious interference claim, as cast by Pharmacy, is also within that class of claims that can be brought only by the trustee for PAM. Pharmacy alleges that FoxMeyer's purchase of certain assets from PAM prevented PAM from fulfilling its contractual obligations to its customers. Thus, to the extent FoxMeyer's purchase injured one creditor, it injured all creditors of PAM. The tortious interference claim asserted by Pharmacy, therefore, is a "derivative" claim like the corporate trust fund and denuding theories discussed in *MortgageAmerica* and is subject to the automatic stay.

B. CLAIMS BELONGING TO OR INVOLVING PROPERTY OF THE ESTATE SHOULD BE ASSERTABLE ONLY BY THE TRUSTEE IN BANKRUPTCY.

Having properly analyzed the true character of Pharmacy's Bulk Transfers Act claim, the Eighth Circuit then erred. Instead of dismissing the claim (as had been done by the trial court), the appellate court sanctioned an illogical and inequitable procedure for asserting this claim. The Eighth Circuit concluded that Pharmacy, an unsecured creditor of PAM, could pursue its Bulk Transfers claim *on behalf of all of PAM's creditors*. In a meager analysis, the Eighth Circuit simply stated:

⁴At least one other district court has applied the automatic stay to a Bulk Transfers Act claim. See *In re Central Heating & Air Conditioning, Inc.*, 64 B.R. 733 (N.D. Ohio 1986).

Pharmacy's claim under the Act, at least as limited by this opinion, is separate from any claims Stone's Pharmacy has against PAM, and therefore PAM's bankruptcy and the automatic stay do not affect the continuation of this action.¹ We agree that Stone's Pharmacy cannot reduce its claim against PAM to judgment in this action without the permission of the bankruptcy court.

Stone's Pharmacy II, 875 F.2d at 667. Apparently, the Eighth Circuit believed that, by recasting Pharmacy's "remedy" as a gathering of the assets to be held until the rights of PAM's creditors have been determined, it was protecting PAM's bankruptcy estate and would not be offending the principles underlying the bankruptcy laws. In fact, as further justification for its actions, the Eighth Circuit stated that, since the trustee had elected not to pursue the Bulk Transfers Act claim against Fox-Meyer, Pharmacy was free to do so.

1. The Arkansas District Court Lacks Jurisdiction To Adjudicate Pharmacy's Claim.

The first problem with the Eighth Circuit's "reconstitution" of Pharmacy's remedy is that the district court in Arkansas lacks subject matter jurisdiction to adjudicate interests in PAM's property. The Bankruptcy Code provides that "the district court in which a case under [the Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case and of property of the estate." 28 U.S.C. § 1334(d)(West Supp. 1989). The Fifth Circuit in *MortgageAmerica* characterized this exclusive jurisdiction as one of the "mainstays of an action under Chapter 7." *Id.* at 1273.

In this case, PAM commenced its bankruptcy proceeding in the District Court for the Northern District of Texas. Once that occurred, the Arkansas court lost jurisdiction over any property of the bankruptcy estate.

The Eighth Circuit plainly ignored this provision, however. On the one hand, the appellate court accepted the notion that Pharmacy's claim was the property of PAM's bankruptcy estate. On the other hand, the Court of Appeals allowed Pharmacy to pursue the claim in Arkansas — despite the express language of §1334(d).

2. The Eighth Circuit Failed To Comprehend The True Facts.

The second problem with the decision below is that the Eighth Circuit's justification for allowing Pharmacy to pursue this claim is based on a complete misconception about the procedural history of this lawsuit. Pharmacy *never* sought the relief that the Eighth Circuit suggests is proper. Instead, Pharmacy sought to recover its breach of contract damages directly against FoxMeyer because FoxMeyer allegedly failed to give notice under the Bulk Transfers Act. Pharmacy certainly did not ask to be a class representative for all of PAM's creditors. Indeed, even to this day, Pharmacy has not amended its pleading to request such relief.

The Eighth Circuit also misconceived (and mischaracterized) the PAM trustee's actions with respect to this claim. From the Eighth Circuit's opinion, it appears that the Court believed that Sherman, the PAM trustee, is taking no action against FoxMeyer at all. As the record plainly demonstrated, however, this is simply not true. The PAM trustee initially brought the very same claim against FoxMeyer that Pharmacy is asserting. Sherman then dismissed his Bulk Transfers action because he decided it was in the best interest of PAM's estate to bring a conversion claim and RICO action based on FoxMeyer's purchase of assets from PAM. Thus, the PAM trustee is not simply passive. On the contrary, he is actively pursuing those claims which he believes are in the best interest of PAM's bankruptcy estate to pursue.

Yet another mistake made by the Eighth Circuit is that the Court failed to consider the fact that Pharmacy attempted to have the automatic stay lifted in Dallas so that it could pursue its claims, *one of which was to recover property of the estate*. The District Court in Dallas, however, refused to lift the stay. Thus, the stay remained in effect as to all property of the debtor.

3. The Eighth Circuit's Opinion Will Destroy The Equitable Scheme Of The Bankruptcy Laws.

These mistakes by the panel of the Eighth Circuit have set a disastrous precedent and have created a potential jurisdictional nightmare for the bankruptcy court and the district court in Arkansas. Certainly, FoxMeyer's ability to defend against such claims has been severely compromised. Bankruptcy creditors who reside in the Eighth Circuit are now free to prosecute suits against imagined wrongdoers without the supervision of the bankruptcy courts—even though they are not the real parties in interest. Indeed, the decision of the Eighth Circuit has completely contravened the purpose of Rule 17 of the Federal Rules of Civil Procedure.

Rule 17, of course, provides that "every action shall be prosecuted in the name of the real party in interest." In the Notes of Advisory Committee on Rules on the 1966 amendment, the Committee described a primary function of Rule 17 as follows:

[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as *res judicata*.

See also Hanna Mining, Co. v. Minnesota Power & Light, Co., 573 F.Supp. 1395 (D. Minn. 1983), *aff'd*, 739 F.2d 1368 (1984).

PAM's bankruptcy estate, through its trustee, is clearly the real party in interest in this action. Any recovery in Arkansas

must be turned over to the bankruptcy court in Dallas. Yet, the PAM trustee is not a party to this action. The result is that FoxMeyer will not be protected against future claims by any other party — including PAM's trustee.

Moreover, with Pharmacy as the "front man" for the bankruptcy estate's claim, FoxMeyer is deprived of valuable defenses that it would have if the PAM trustee had brought this suit. For example, in the second adversary proceeding that he brought against FoxMeyer in Dallas, the PAM trustee admitted that FoxMeyer did *not* purchase the "bulk" of PAM's assets. As the case stands, however, FoxMeyer is now having to defend against a Bulk Transfers Act claim arising out of the same transaction without being able to use this binding judicial admission.

Furthermore, the Eighth Circuit's new rule that an unsecured creditor may bring claims belonging to or involving property of the bankruptcy estate is ripe for abuse. The situation is analogous to a class action brought under Rule 23 of the Federal Rules of Civil Procedure without any of the safeguards.

In this case, Pharmacy has not satisfied any of the requirements that a plaintiff would have to meet in a class action lawsuit. For example, there is no indication that Pharmacy is an appropriate representative for the class of PAM's creditors. There is no indication that Pharmacy has the proper motive to litigate this action. Indeed, even assuming that Pharmacy could prove a violation of the Bulk Transfers Act, Pharmacy may never receive a dime of that recovery because, as the Eighth Circuit pointed out, the rights of PAM's creditors would first have to be determined in the "appropriate forum" — *i.e.*, obviously, in a bankruptcy court in Dallas.

Finally, there is nothing to prevent Pharmacy from settling its "class action" for its own benefit and, in the process, "selling" PAM's other creditors "down the river". In actions brought under Rule 23 of the Federal Rules of Civil Procedure, a class action cannot be dismissed without the approval of the court and notice to all members of the class. Fed.R.Civ.P. 23(e). No such restric-

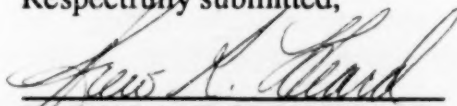
tions are placed on Pharmacy in this action. In other words, the Eighth Circuit's "limitation" on Pharmacy's "recovery" might ultimately not prevent Pharmacy from appropriating property (i.e., settlement money) from PAM's estate.

CONCLUSION

The issue before this Court has enormous practical implications. As the Fifth Circuit has noted, the Bankruptcy Code and "common sense" dictate that actions belonging to or involving property of the estate be adjudicated in the bankruptcy forum. *MortgageAmerica*, 714 F.2d at 1277. "Any other result would produce near anarchy where the only discernable organizing principle would be first-come-first-served." *Id.* at 1276. If the Eighth Circuit's opinion is allowed to stand, there will be no other organizing principle except first-come-first-served. Creditors, in a "multi-jurisdictional race to judgment," may each bring their separate actions outside the bankruptcy proceeding and thereby threaten the very core of the equitable distribution scheme of the Bankruptcy Code.

For all of the reasons state above, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that, pursuant to Rule 28 of the Rules of the Supreme Court, three (3) copies of the foregoing have been sent by U.S. Mail to Stanley D. Rauls, Perroni, Rauls & Looney, the Koger Center, Suite 215, 10810 Executive Center Drive, Little Rock, Arkansas 72211 on this 26th day of September, 1989.


DREW RANDOLPH HEARD

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-2071

Stone's Pharmacy, Inc.,	*
Appellant,	*
v.	*
	*
Pharmacy Accounting Management,*	
Inc. d/b/a PAM Computer Systems,*	
FoxMeyer Corporation,	* Appeal from the United
Appellee.	* States District Court for the
*****	* Eastern District of Arkan-
	*
Stone's Pharmacy, Inc.,	*
Appellant,	*
	*
v.	*
	*
Foxmeyer TBL, Inc.; and FoxMeyer*	
Information Systems, Inc.,	*
Appellee.	*

Submitted: January 9, 1989
Filed: May 22, 1989

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior
Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Stone's Pharmacy appeals the district court's dismissal of its action against Pharmacy Accounting Management, Inc. (PAM) and FoxMeyer.¹ We reverse.

I. Background

We will discuss the facts of this case only briefly. They are set out in more detail in our earlier decision in this case, *Stone's Pharmacy, Inc. v. Pharmacy Accounting Management, Inc.*, 812 F.2d 1063 (8th Cir. 1987) (*Stone's Pharmacy I*).

In December of 1984, Stone's Pharmacy purchased a pharmacy computer system from PAM. Included in the sale was a maintenance agreement requiring PAM to provide updated information on a continuing basis and maintenance for the computer hardware as needed.

In January of 1985, FoxMeyer purchased a portion of the assets of PAM.² Following the purchase, neither PAM nor FoxMeyer provided maintenance under the agreement. Consequently, Stone's Pharmacy filed this action against PAM and FoxMeyer. Stone's Pharmacy alleged several causes of action including claims that PAM breached the maintenance agreement, that FoxMeyer failed to comply with the Bulk Transfers Act³, and that FoxMeyer had tortiously interfered with the maintenance contract between PAM and Stone's Pharmacy by purchasing PAM's inventory and assets.

¹FoxMeyer refers to FoxMeyer Corporation, FoxMeyer-TBL, Inc. and FoxMeyer Information Systems, an interrelated group of companies.

²Exactly what portion of PAM's assets was transferred is disputed. *Stone's Pharmacy I*, 812 F.2d at 1067 and n.4.

³We determined in our earlier opinion that the Texas Bulk Transfers Act applies in the case because the agreement between PAM and FoxMeyer indicated that the assets and inventory transferred by PAM were located in Texas. *Stone's Pharmacy I*, 812 F.2d at 1065 (citing Tex. Bus. & Com. Code Ann. Sec. 6.102 (d)).

After Stone's Pharmacy filed suit, PAM filed for bankruptcy under Chapter 7 of the Bankruptcy Code. Prior to trial, the district court granted summary judgment in favor of FoxMeyer. On appeal, this court reversed and remanded the case for further consideration.

On remand the district court dismissed the case. The court held that PAM was an indispensable party and that PAM's bankruptcy prevented further proceedings in this case. The court also held that the Bulk Transfers Act cause of action belonged to all of PAM's creditors, even though it was brought by Stone's Pharmacy. The court found that the claim, therefore, was property of PAM's bankruptcy estate and could only be asserted in bankruptcy proceedings.

II. Discussion

A. Dismissal of bulk transfer claim

1. Necessary party

As indicated, the district court dismissed Pharmacy's claim under the Bulk Transfers Act because the court concluded that PAM was a necessary party to the action. The district court concluded that without PAM, complete relief could not be afforded because Stone's Pharmacy could not perfect its breach of contract claim against PAM. In addition, the court was concerned that PAM's trustee in bankruptcy, acting on behalf of all of PAM's creditors, might have an interest in the transferred assets which interest could not be protected if Stone's Pharmacy were allowed to proceed with its claim against the transferred assets without PAM or the trustee as a party.

The court also concluded that, due to the imposition of the automatic stay of 11 U.S.C. § 362 (Supp. IV 1986), PAM was no longer a party to the action and could not become a party until the bankruptcy proceedings had concluded. Thus, because an indispensable party was unavailable, the action was dismissed.

The purpose of the Bulk Transfers Act is to protect a transferor's creditors by requiring the transferee to give notice of the transfer of assets. This allows creditors to make whatever arrangements are necessary to protect any rights the creditors may have in the assets which are to be transferred. If a creditor is not given the required notice, then the Act gives the creditor the opportunity to protect his interests in the property even after the transfer has occurred. The Act, however, does not set forth the nature of the remedies which are available to creditors if the requirements of the Act are not met. It states only that the bulk transfer "is ineffective against any creditor of the transferor" who does not receive notice of the transfer. Tex. Bus. & Com. Code Ann. § 6.105. Under Texas law, if the creditor has a judgment against the transferor then he has the same rights to levy upon the property as he would have if the property were still in the possession of the transferor. *Anderson & Clayton Co. v. Earnest*, 610 S.W.2d 846, 848 (Tex. Ct. App. 1980). If the creditor does not have a judgment against the debtor the creditor may seek a judgment from the debtor "and also seek to have the bulk sale set aside, further transfers enjoined, and a receiver or trustee appointed or designated to gather the assets and preserve them for distribution pro rata among the creditors." *Id.* (citing *Southwestern Drug Corp. v. McKesson & Robbins, Inc.*, 172 S.W.2d 485, 486 (Tex. 1943)).

Although Stone's Pharmacy does not have a judgment against PAM, it may still proceed in its claim under the Act against FoxMeyer without PAM as a party to the action. Pharmacy's claim against FoxMeyer is simply that the transfer of the assets from PAM to FoxMeyer was made in violation of

the Act. PAM is not necessary to make that determination. Consequently, we remand this case to the district court to resolve the factual issues that the earlier panel of this court directed the district court to resolve, i.e., (a) what part of PAM's assets was transferred, (b) whether it was a "major part" as required by the Act, and (c) whether the exception of section 6.103(3) applies. *Stone's Pharmacy I*, 812 F.2d at 1066-67. If the district court finds that a violation of the Bulk Transfers Act did occur, it should order a gathering of the assets (or their value) to be held until the rights of PAM's creditors, including Stone's Pharmacy, have been determined in the appropriate forum.

2. Automatic stay

The district court also held that Pharmacy's cause of action under the Bulk Transfers Act should be dismissed because the claim is property of the bankruptcy estate and can be brought only in bankruptcy proceedings. The court based this conclusion, in part, on the analysis of the Fifth Circuit in *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983).

In *In re MortgageAmerica*, the Fifth Circuit determined that the a creditor's claims against the sole shareholder of a debtor corporation were subject to the automatic stay because the claims themselves were property of the debtor corporation or involved property of the corporation. *Id.* at 1277. Using the Fifth Circuit's analysis, the district court determined that the Bulk Transfers Act claim was property of PAM's bankruptcy estate and concluded that the claim was subject to the automatic stay and should be dismissed.

We disagree that the Fifth Circuit's analysis in *In re MortgageAmerica* is applicable to Pharmacy's claim against FoxMeyer. Pharmacy's claim under the Act, at least as limited by this opinion, is separate from any claim Stone's Pharmacy has against PAM and therefore PAM's bankruptcy and the automatic

stay do not affect the continuation of this action. We agree that Stone's Pharmacy cannot reduce its claim against PAM to judgment in this action without the permission of the bankruptcy court. And, from the rulings previously made by the bankruptcy court, it appears that Pharmacy's claim against PAM will be litigated in the bankruptcy proceedings. Such litigation, however, does not extinguish the rights of Stone's Pharmacy to seek to assemble the transferred assets for proper distribution when all interests are determined, especially since the record indicates that the bankruptcy trustee has apparently chosen not to pursue the bulk transfers claim in the bankruptcy proceeding or otherwise.

B. Dismissal of tortious interference claim

Stone's Pharmacy also asserted a claim against FoxMeyer for tortious interference with the maintenance contract between PAM and Stone's Pharmacy. The district court dismissed this claim at the same time it dismissed the bulk sales claim. Although the court dismissed both of Pharmacy's claims, it discussed its reasons for the dismissal only in connection with the claim under the Bulk Transfers Act. Assuming that the court dismissed the tort claim for the same reasons, we find that the court erred in doing so.

It is clear that PAM is not a necessary party to the tort claim. Although the claim arose out of the sale of PAM's assets to FoxMeyer, there is no need for PAM to be involved in the action.

Any potential liability on the part of PAM for breach of contract is irrelevant to this claim. The fact that PAM failed to perform the contract is simply an element of proof which Stone's Pharmacy has the burden of showing.

It is also apparent that this cause of action has no connection with the bankruptcy proceedings of PAM and therefore the automatic stay would not be applicable. Consequently, we find

that dismissal of this claim was not proper and that the automatic stay does not affect the continuance of this claim.

III. Conclusion

For the foregoing reasons, the judgment of the district court is reversed and remanded with instructions to reinstate the action, complete limited proceedings under the Bulk Transfers Act claim, and allow the tortious interference claim to proceed unless it is otherwise not viable under the law.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2071

Stone's Pharmacy, Inc.,

Appellant,

vs.

Pharmacy Accounting
Management, Inc., etc.,
et al.,

Appellees.

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Order Denying Petition
for Rehearing and Sug-
gestion for Rehearing

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 28, 1989

Order Entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

STONE'S PHARMACY, INC.
PLAINTIFF

v.

CASE NO. J-C-85-47

PHARMACY ACCOUNTING MANAGEMENT, INC.,
d/b/a PAM COMPUTER SYSTEMS and
FOXMEYER CORPORATION DEFENDANTS

STONE'S PHARMACY, INC. PLAINTIFF

v.

CASE NO. J-C-85-209

FOXMEYER TBL, INC. and
FOXMEYER INFORMATION SYSTEMS, INC.
DEFENDANTS

ORDER

This consolidated action arises out of the sale of certain assets of Pharmacy Accounting Management, Inc. ("PAM") to FoxMeyer TBL, Inc., and FoxMeyer Information Systems, Inc. Corporation. The proceeds of the sale were paid to InterFirst Bank, Dallas, Texas, N.A. ("InterFirst"), which had a security interest in all of the inventory transferred. PAM is now in bankruptcy. Most of the factual allegations in the two complaints are alike or identical.

Plaintiff, Stone's Pharmacy, Inc. ("Stone's Pharmacy") alleges that on or about December 3, 1984, it entered into a contract

with PAM to purchase a 32-byte computer system. Stone's Pharmacy further alleges that in return for the purchase price and additional monthly payments, to be made by Stone's Pharmacy, PAM agreed to maintain, service and update the equipment and software. It is then alleged that "shortly after the purchase price was paid, PAM breached its agreement to maintain, service and update the equipment and software." Stone's Pharmacy then alleges that in January, 1985 all of PAM's assets were transferred to defendant FoxMeyer Corporation and that said transfer allegedly violated the Texas Bulk Transfers Act, Tex. Bus. Comm. Code § 6.101 et seq ("Bulk Transfers Act"). Essentially, Stone's Pharmacy, relying on the sale and maintenance contract with PAM, considers itself PAM's "creditor" and therefore, pursuant to the Bulk Transfers Act, entitled to notice of the transfer of PAM's assets to FoxMeyer TBL, Inc., and FoxMeyer Information Systems, Inc. PAM also alleges that the FoxMeyer defendants tortiously interfered with its contractual rights and obligations contained in the contract between PAM and Stone's Pharmacy and caused PAM to fail to perform the contract. Jurisdiction in both cases is based upon diversity of citizenship and the proper jurisdictional amount. Texas law applies.

It is conceded by all parties that PAM went into bankruptcy proceeding around the first of March 1985 and that the standard bankruptcy stay order was issued. Furthermore, plaintiff has received no relief from that stay for the purposes of pursuing this action. Since PAM's bankruptcy the action has been treated as one between Stone's Pharmacy, Inc., and the FoxMeyer defendants. Stone's Pharmacy does not contend that it has a right to proceed against PAM in this consolidated action, recognizing the effect of the intervening bankruptcy proceeding. On April 17, 1986, the Court granted summary judgment in favor of Foxmeyer on the basis that the transfer of assets from PAM to FoxMeyer was not within the scope of the Bulk Transfers Act and that there was no factual basis for Stone's Pharmacy's claim of tortious interference with contract. The Eighth Circuit reversed and remanded on the basis that the Court erred in concluding that the

transfer was not within the scope of the Bulk Transfers Act and held that whether such was the case could not be determined as a matter of law and would require the determination of certain factual questions.

In a telephone conference on May 6, 1988, the Court informed the parties of its view that this action should be dismissed on two grounds; first, the absence of Pharmacy Accounting Management, Inc., an indispensable party; and second, pursuant to the automatic stay in PAM's bankruptcy because the derivative claim being asserted against FoxMeyer is, under Texas law, considered property "belonging to" the bankrupt estate and may only be asserted in the bankruptcy proceeding. The Court's discussion and its conclusions made on the record during that telephone conference are adopted and made part of this opinion.

Stone's Pharmacy requested and was granted an opportunity to brief the above identified issues. Plaintiff was to submit its brief on or before May 20, 1988. The defendants were given until May 30, 1988 to submit a reply brief. Stone's Pharmacy has informed the Court of its decision not to brief the issues.

Therefore, the Court will dismiss this action pursuant to the grounds stated above.

In the bankruptcy context, Stone's Pharmacy, Inc., is, at best, a general creditor. It has not obtained a judgment against PAM. The Court concludes that vindication of the most basic principles of our bankruptcy laws requires the Court to dismiss the case. PAM is a necessary party to any action to determine its liability to Stone's Pharmacy, Inc. Stone's Pharmacy's claim against PAM has not been "liquidated" by being reduced to judgment. The Court wants to emphasize that this is a different question from the one dealt with by the Court of Appeals. There, the question was whether Stone's Pharmacy was a "creditor" within the meaning of the Bulk Sales Act and thereby entitled to notice of the bulk sales transfer. The Court of Appeals held that "those holding claims [against the transferor] based on transactions or events occurring before the bulk transfer" are considered "creditors," Stone's Pharmacy, Inc., v. Pharmacy Accounting

Management, et al, No. 86-1619 at 5 (8th Cir. March 3, 1987) (citing Texas Bus. Comm. Code Ann. § 6.109(a), Comment I). Since Stone's Pharmacy had the right to require the fulfillment of the terms of its contract with PAM, it was a creditor entitled to notice under the bulk sales law. This Court fully accepts that ruling but it does not reach the point which concerns the Court here.

The Court of Appeal's ruling makes it clear that Stone's Pharmacy had the perfect right to sue, as it did, both PAM for breach of contract and, in the same action, FoxMeyer for violating the Bulk Sales Act. But the fact that a creditor of PAM can proceed with both causes of action at the same time, does not mean that the case should proceed without PAM as a party. Stone's Pharmacy is a "creditor" for the purposes of the Bulk Sales Act but it has never established that PAM violated the contract or that it suffered any particular amount of damage as a consequence thereof. Because of the bankruptcy stay order Stone's Pharmacy cannot proceed against PAM here. And PAM is no longer a party to this action.

Fed. R. Civ. P. 19, Joinder of Persons Needed for Just Adjudication, states in relevant part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(b)Determination by the Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Pursuant to Rule 19(a) the Court concludes that PAM is a necessary party to this action. First, without PAM as a party, complete relief cannot be accorded to Stone's Pharmacy. However one looks at it, the Texas Bulk Sales Act provides only a derivative right in favor of those who are able to perfect their claims against the transferor. With PAM, the transferor, in bankruptcy Stone's Pharmacy cannot possibly perfect its claim outside the bankruptcy context. Second, PAM, or more specifically, PAM's trustee, on behalf of PAM's creditors would seem to claim an interest relating to the transferred assets and equipment and is so situated (in bankruptcy) that the disposition of the action in its absence may as a practical matter impede PAM's ability to protect that interest. This second point is somewhat diminished by the fact that PAM's trustee has voluntarily dismissed his bulk transfers claim against FoxMeyer. Nevertheless, the Court concludes that under the first point - that in PAM's absence complete relief cannot be accorded - PAM is a necessary party to this action.

Next, the Court must determine under Rule 19(b) whether in equity and good conscience this action should proceed among the parties before it, or should be dismissed, with PAM being regarded as "indispensable." Applying the criteria as set out in Rule 19(b) the Court concludes the PAM is an "indispensable" party and this action should be dismissed. First, a judgment rendered in PAM's absence would be prejudicial as to PAM in that it would require a determination, in PAM's absence, that PAM breached its maintenance and update contract with Stone's Pharmacy. Second, the apparent prejudice to PAM cannot be lessened or avoided by the shaping of relief or other measures.

Any relief accorded to Stone's Pharmacy inherently requires that the Court conclude that PAM had breached its maintenance and update contract with Stone's Pharmacy. Third, a judgment rendered in PAM's absence will not be adequate. This question of what damages Stone's Pharmacy would be entitled to should it prevail has been repeatedly raised. Judge Gibson's remand opinion states that: -

This case is perplexing in that we think the defendants might be subject to the proscriptions of the Bulk Transfers Act, but on the other hand it is difficult to perceive how the plaintiff can benefit if the structures of the Act are applied. If the Act does apply, the district court house also require Stone's Pharmacy to show how it was damaged. We question whether Stone's Pharmacy was prejudiced by FoxMeyer's noncompliance. Stone's Pharmacy would not have been place in a better position had it been given notice. It is true that a noncomplying transferee's liability is that of a receiver who is bound to that the transferred property or its value is applied to the satisfaction of the creditors' claims. Anderson & Clayton Co. v. Earnest, 610 S.W.2d 846, 848 (Tex. Ct. App. 1980). Yet, any pretransfer security interest survives a noncomplying transfer. In re McBee, 714 F.2d 1316, 1328 (5th Cir. 1983). InterFirst Bank held a security

interest in substantially all of PAM's assets and inventory. All the proceeds of the transfer went to InterFirst and did not extinguish the debt. Stone's Pharmacy has not demonstrated how its unsecured claim would have been superior to InterFirst's claim.

Stone's Pharmacy, Inc., v. Pharmacy Accounting Management, et al, No. 86-1619 at 8 (8th Cir. March 3, 1987)(Footnote omitted).

The Texas Court of Civil Appeals has also had occasion to discuss the "perplexing" question of remedies under the Texas Bulk Transfers Act. In Anderson & Clayton Co., v. Earnest, 610 S.W.2d 846 (Tex. Civ. App. 1980), a creditor brought suit under the Bulk Transfers Act seeking to secure a personal judgment against a transferee on an account owed to creditor by the transferor. In discussing the question of remedies the court stated:

The Act does not, however, spell out the remedies available to a creditor if the notice provisions are not followed. It simply states that the bulk transfer is 'ineffective against any creditor of the transferor' unless the requirements of the Act are followed. Apparently the creditor is relegated to whatever remedial relief is afforded by state law outside the code. Thus, if the creditor already has a judgment against the transferor and the bulk sale of assets is ineffective as to the creditor, the creditor would have the same right to levy execution on the assets as would have existed prior to the bulk sale. If the creditor does not have a judgment against the transferor, an alternate remedy would be to seek one and also seek to have the bulk sale set aside, further transfers enjoined, and a receiver or trustee appointed or designated to gather the assets and preserve them for distribution pro rata among the creditors.

Id. at 848 (citations omitted). Stone's Pharmacy does not have a judgment against PAM. It is, however, seeking one in the Bankruptcy Court. Thus, even if this Court could decide the bulk sales issue, it could not render an adequate judgment outside the bankruptcy proceedings.

Finally, the Court concludes that Stone's Pharmacy will have an adequate remedy if this action is dismissed for non-joinder. As has already been stated, Stone's Pharmacy can and has pursued its remedy in PAM's bankruptcy proceeding. In the bankruptcy proceeding, each individual general creditor has a direct interest in opposing the claims of other general creditors. The interested parties are not limited to PAM and Stone's Pharmacy, in this context. The bankruptcy law provides a locus for dealing with all of the claims of the debtor on a basis fair to all of its creditors. If this proceeding were permitted to go forward in the absence of PAM or its trustee in bankruptcy, it is possible that one of the creditors of the bankrupt, that is, Stone's Pharmacy, could, in effect, obtain a judgment against the debtor (PAM) and then collect it against property or assets that, under Texas law, should be held for the benefit of all creditors similarly situated. This brings the Court to its second basis for dismissal - PAM bankruptcy stay order.

Not only must the case be dismissed because of the absence of a necessary, but completely unavailable, i.e., "indispensable" party, but it must also be dismissed because the derivative claim being asserted against FoxMeyer is, under Texas law, considered property "belonging to" the bankrupt estate and pursuant to the automatic stay provision of the Bankruptcy Code, may only be asserted in the bankruptcy proceedings. 11 U.S.C. § 362(a). The Court in this connection agrees with the argument of defendant's counsel set forth on pages 2 - 5 of its Amended Trial Brief, filed herein in late April, 1988.

As stated in Southwestern Drug Corporation v. McKesson & Robbins, Inc.:

[I]f the purchaser or transferee shall not comply with the provisions of the law, upon application of any of the creditors of the seller or transferor the purchaser or transferee thereof shall become a receiver for the benefit of all creditors.

172 S.W. 2d 485, 486 (1943). All of the other creditors of PAM who were entitled to, but did not receive notice of the bulk sales transfer should participate equally in the fruits of any efforts made to successfully reach the property transferred (or its value from FoxMeyer). This would appear to be true whether the transfer was fraudulent or not, if it were in violation of the Bulk Sales Act. The handling of such claims is precisely what the bankruptcy law is all about:

Actions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws would interfere with this estate and with the equitable distribution scheme dependent upon it, and therefore are properly stayed under section 362(a)(3). Any other result would produce near anarchy when the discernible organizing principle would be first-come-first-served. Even without the Bankruptcy Code and the policies that support it, we would be reluctant to elevate such a principle to a rule of law.

The Court is particularly impressed with the decision of Judge Aldrich in In re Central Heating & Air Conditioning, Inc., 64 B.R. 733 (N.D. Ohio 1986), wherein a creditor brought a state law suit against a corporation and three of its officers for allegedly receiving false conveyances of assets belonging to the debtor. Judge Aldrich, relying on the Fifth Circuit's opinion in In re MortgageAmerica, supra, held that the creditor's collateral action against the transferee and its officers seeking to secure its obligation by attacking fraudulent conveyances was subject to the automatic stay:

No matter how Famous attempts to frame its action against the third parties, it cannot disguise the fact that it is attempting to push its way to the front of the line of creditors, rather than seeking redress for a unique injury.

In re Central Heating & Air Conditioning, Inc., 64 B.R. at 737.

Similarly, as the Court has already noted, Stone's Pharmacy, should not be able, by way of the instant action, to push its way to the front of the line of PAM's creditors. Therefore, the Court feels required under the law to dismiss this proceeding. The Court again notes that the plaintiff has, indeed, filed its claim with the bankruptcy court in Texas. Plaintiff seeks a jury trial. It is not at all clear to this Court that it will not be entitled to such a trial — perhaps even before an Article III court. But such a proceeding would be under the overall control and direction of the bankruptcy court. And that issue would have to be taken up and resolved there. It is not even inconceivable that, with PAM's interests being represented by the trustee, the trial of the factual issues, if any, could be conducted in another venue. However, it does appear that most of the evidence concerning Stone's Pharmacy's complaints against the FoxMeyer corporations involve Texas witnesses and documents. But all of this is speculation. The point is that the Court must honor the bankruptcy stay, and will do so by dismissing this action.

IT IS THEREFORE ordered that this action be, and it is hereby, dismissed without prejudice on the grounds stated hereinabove.

Dated this ___ day of June, 1988.

United States District Judge

Supreme Court, U.S.

FILED

DEC 15 1989

JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1989

No. 89-534

FOXMEYER CORPORATION, FOXMEYER - TBL, INC.
and FOXMEYER INFORMATION SYSTEMS, INC.

Petitioners

vs.

STONE'S PHARMACY, INC.

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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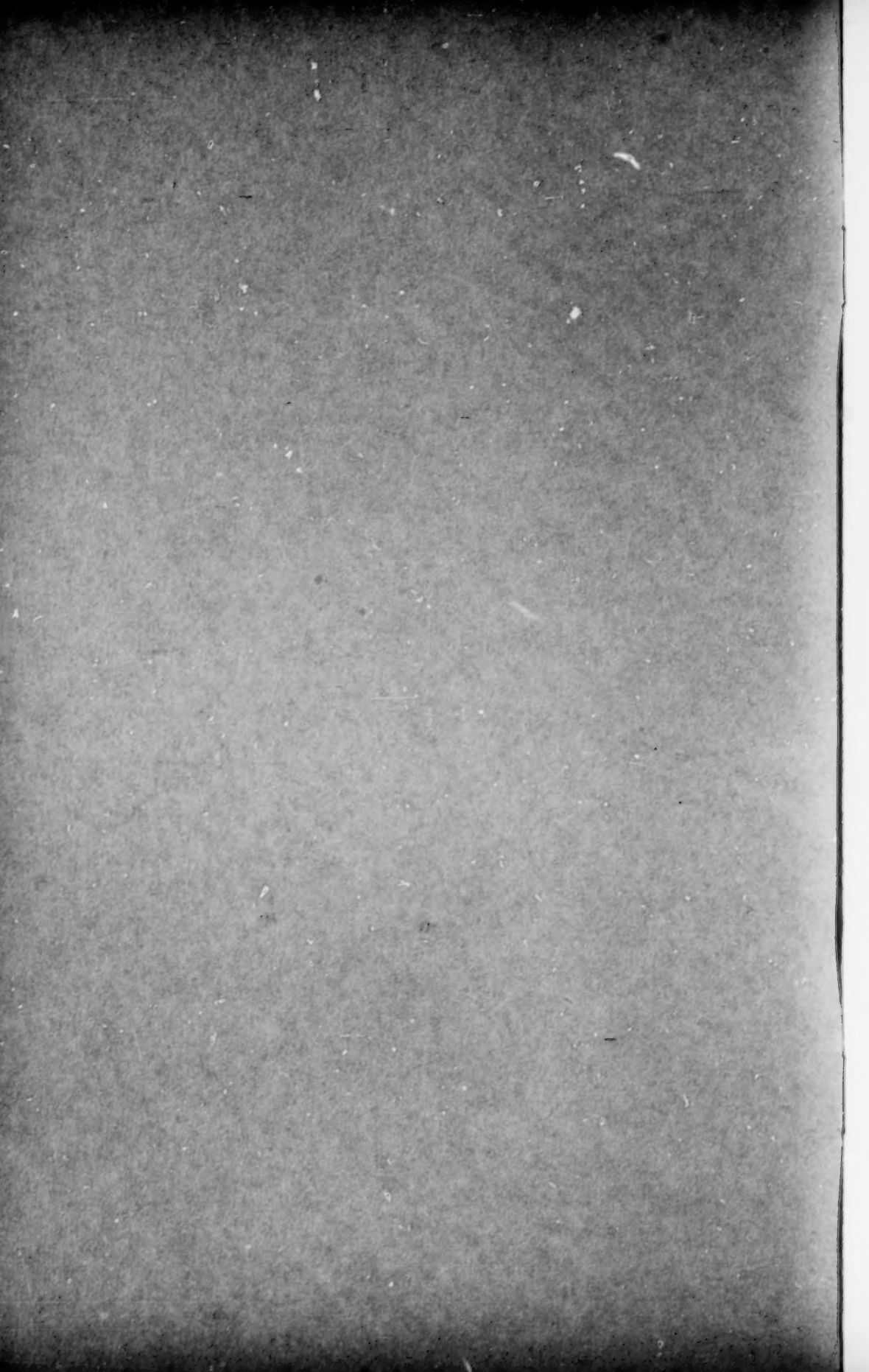


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**In the
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STONE'S PHARMACY, INC.

Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATEMENT

In December, 1984, the plaintiff (the respondent) purchased a pharmacy computer system from Pharmacy Accounting Management, Inc. (PAM) for \$29,900.00. The sale entailed the delivery of both hardware and software for a specialized computer to be used by the plaintiff in operating a retail pharmacy and keeping books and records. The sale further included a maintenance agreement which required PAM to update information on a continuing basis and maintain the computer hardware.

Around January 17, 1985, FoxMeyer (the petitioner) purchased the assets of PAM (which included inventory and equipment) and moved into PAM facilities, taking control over all PAM assets. No notice of the transfer of assets was given to

the plaintiff, a creditor of PAM, as required by article six of the Uniform Commercial code (Bulk Transfer Act).

During purchase negotiations with PAM, FoxMeyer's attorney prepared several preliminary drafts of the purchase agreement. The language in the preliminary drafts specifically required compliance with the Bulk Transfer Act and specified that the transaction would be closed only after compliance with that statute. Before closing, FoxMeyer advised its attorney that the purchase had been "restructured" for "business reasons." The preliminary drafts of the purchase agreement had contemplated a purchase of substantially all of the assets of PAM, and the final agreement was allegedly altered to provide for a transfer of only a portion of the PAM assets to FoxMeyer. References to compliance with the Bulk Transfer Act were removed from the purchase agreement, and the transaction was closed.

All PAM assets were in possession and control of FoxMeyer after January 17, 1985. FoxMeyer ultimately used all but an insignificant portion of the equipment and inventory formerly owned by PAM. PAM ceased to do business after the transfer and filed a petition for liquidation with the bankruptcy court in March, 1985, after the original complaint was filed in the case below. FoxMeyer subsequently returned a minute portion of the PAM assets to the bankruptcy trustee, alleging that the items returned had not actually been purchased. Almost all of the inventory of PAM was retained and used by FoxMeyer.

The computer purchased by the plaintiff was nonfunctional, and without the promised hardware and software support, it was virtually worthless. The plaintiff filed its complaint alleging that FoxMeyer had failed to comply with the Bulk Transfer Act and had tortiously interfered with the contract between PAM and the plaintiff.

The cause of action initially named PAM, alleging a breach of contract, but that portion of the action was not pursued after PAM filed its petition in bankruptcy court in Dallas, Texas.

This matter was first scheduled for trial in April, 1986. During the week before the scheduled trial, the district judge granted FoxMeyer's summary judgment motion, ruling that the Bulk Transfer Act only applied to transactions specifically proven to be fraudulent; that the transfer was exempt from the Bulk Transfer Act since the sales proceeds were allegedly paid to a secured creditor at the request of FoxMeyer; and that the plaintiff was not a creditor within the meaning of the Bulk Transfer Act since its claim was not liquidated at the time of the transfer. The district judge also granted summary judgment in regard to the tortious interference with contract claim, stating that there were no material facts in dispute. The United States Court of Appeals for the Eighth Circuit reversed the lower court's ruling and remanded the case for trial, *Stone's Pharmacy v. Pharmacy Accounting Management*, 812 F.2d 1063 (8th Cir. 1987).

On remand, the trial court, sua sponte, decided that the case against FoxMeyer should be dismissed because of the PAM bankruptcy proceedings. The trial court held that PAM was an indispensable party under Rule 19, FRCP and further held that the automatic stay in PAM's bankruptcy proceedings prohibited any proceedings against FoxMeyer. Another panel of the Eighth Circuit reversed and remanded the case for trial in district court where it is now pending.

REASONS FOR DENYING THE WRIT

The Bulk Transfer Act claim against FoxMeyer arose from FoxMeyer's failure to give prior notice of a bulk transfer, the acquisition of PAM inventory and equipment. Since only the purchaser (FoxMeyer) was required by the Bulk Transfer Act to give the notice, subsequent bankruptcy proceedings initiated by the seller (PAM) had no bearing on this case. Neither the bankrupt seller nor its assets were affected by this action, and the application of its bankruptcy stay to protect a totally unrelated company was neither proper nor equitable.

The other cause of action filed against FoxMeyer was for the tortious interference with the contact between the plaintiff and PAM. That claim, too, was directly against FoxMeyer and had no connection with the bankrupt seller or its property. The Eighth Circuit properly returned the matter for trial.

ARGUMENT

THE PLAINTIFF'S CLAIMS DID NOT BELONG TO
THE BANKRUPT SELLER NOR DID THEY AFFECT
ITS PROPERTY

The opinion below noted that the Bulk Transfer Act claim belonged to the plaintiff and did not affect the property of the bankrupt seller. Section 6-105, UCC, outlines the notice required to be given to creditors. That section states:

In addition to the requirements of the preceding section, and bulk transfer subject to this Article except one made by auction sale (Section 6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, *the transferee* gives notice of the transfer in the manner and to the persons hereafter provided (Section 6-107). [emphasis added]

By the clear wording of the statute, the duty to give notice of the transaction was owed solely by FoxMeyer, and that duty was to give notice directly to the plaintiff, a creditor. The Bulk Transfer Act claim was based upon FoxMeyer's failure to give notice to the plaintiff, and the cause of action for that failure accrued solely to the plaintiff — without regard to the seller in the transaction. If creditors were required to wait for sellers to take action against buyers, the Bulk Transfer Act would have virtually no meaning. In that instance, a seller could, as here, declare bankruptcy and deprive creditors of any meaningful remedy against the buyer, a position urged by FoxMeyer.

The trial court ruled that the seller was an indispensable party to the Bulk Transfer Act claim against the purchaser. The various circuits have been relatively uniform in holding that a grantor is not an indispensable

party to a suit to set aside a fraudulent conveyance. See, e.g., *Allan v. Moline Plow*, 14 F.2d 912, 915 (8th Cir. 1926), *Keaton v. Little*, 34 F.2d 396 (10th Cir. 1929), *Keene v. Hale-Halsell*, 118 F.2d 332 (5th Cir. 1940), *Gardner v. Johnson*, 195 F.2d 717 (9th Cir. 1952), *Fischer v. Rio Tiro*, 65 S.W.2d 751 (Commission of Appeals of Texas, 1933), *Reiser v. Bernhard*, 169 N.E.2d 496 (Ct. App. Ohio, 1959) and *Damazo v. Wahby*, 305 A.2d 138 (Ct. App. MD, 1973). Although this was not a fraudulent conveyance action, the rationale that grantors are not indispensable to an action against the buyer would apply with greater force to a Bulk Transfer Act claim, one which requires no fraud but only the failure to give prior notice.

PAM certainly had no interest in the property which it transferred to FoxMeyer—it willingly gave up that interest upon closing. Having transferred all of its interest to FoxMeyer, PAM had no conceivable cause of action against its own purchaser. There was no possibility for PAM to benefit by the litigation below, and PAM should not be considered indispensable to the action.

FoxMeyer complained in its petition that other creditors of PAM could conceivably have been precluded from recovering on their claims. First, FoxMeyer had no standing to make that argument. That argument could only have been presented by the bankruptcy trustee for PAM who was always aware of the action below and made no objection to its continuation against FoxMeyer. Further, the argument assumed other valid claims to the property or its value existed.

There was no connection with other alleged claims and the instant Bulk Transfer Act or tortious interference with contract claims. If FoxMeyer genuinely felt that other creditors of PAM should receive a portion of the property which it had, it could have easily interplead the property or its value in the appropriate court. Instead, FoxMeyer chose to keep the property and pursue motions to dismiss the

plaintiff's action. Not only was the argument inappropriately raised by FoxMeyer, the sincerity of FoxMeyer is highly questionable.

The contention that PAM was an indispensable party certainly had no bearing upon the plaintiff's tortious interference with contract claim. No claim for tortious interference with contract was asserted against PAM, nor could any such claim have been asserted. PAM could not be a party to that claim, much less an indispensable party.

The applicable standard in determining whether a party is indispensable is found in Rule 19, FRCP, which provides:

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a) - (1)-(2) hereof cannot be made a party, the court shall

determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Neither the Bulk Transfer Act claim nor the tortious interference with contract claim met the criteria in subdivision (a) of rule 19. Assuming, arguendo, that the criteria were met, there was absolutely no "equity" or "good conscience" involved in protecting FoxMeyer from a suit for its actions. There was no good reason for effectively granting FoxMeyer absolute immunity from suit for its disregard of the law and the plaintiff's contract rights.

THE AUTOMATIC STAY OF THE SELLER DID NOT APPLY TO AN UNRELATED PURCHASER WHO FAILED TO COMPLY WITH THE BULK TRANSFER ACT AND TORTIOUSLY INTERFERED WITH THE SELLER'S CONTRACT

Absent some connection between the third party and the bankrupt debtor, the courts have uniformly held that the automatic stay should not be extended to third parties. See *Austin v. UNARCO Industries*, 705 F.2d 1 (1st Cir. 1984), *Teachers Annuity v. Butler*, 803 F.2d 61 (2nd Cir. 1986), *Wiliford v. Armstrong World Industries*, 715 F.2d 124 (4th Cir. 1983), *Wedgworth v. Fibreboard*, 706 F.2d 541 (5th Cir. 1983), *Lynch v. Johns-Manville Sales*, 710 F.2d 1194 (6th Cir. 1983), *Pitts v. UNARCO Industries*, 698 F.2d 313 (7th Cir. 1983), and *Fortier v. Dona Anna Plaza*, 747 F.2d

1324 (10th Cir. 1984). Those cases cited by the trial court or by FoxMeyer in trial brief generally involved litigation initiated by the bankrupt debtor in bankruptcy proceedings.

This case was vastly different from those where the request for protection was made by the bankrupt debtor in bankruptcy court. Here, FoxMeyer, the very party who caused the damage to the plaintiff, was afforded protection in an Arkansas district court under an automatic stay of bankruptcy proceedings instituted in Texas by another corporation.

The purpose of any stay is to protect the bankrupt debtor who, in this particular case, made no objection to the proceedings or took any action to prevent the continuation of litigation against FoxMeyer. There was no justification for a district court in unrelated proceedings to apply a bankruptcy stay for an unrelated entity to FoxMeyer.

If one were to accept every premise upon which FoxMeyer was afforded protection under PAM's bankruptcy stay, there remained one very important question—why was the action dismissed? Had the action been solely against PAM, the entity for whose sake the action was allegedly dismissed, the case would not have been dismissed, it would have been stayed. How can a greater benefit be conferred upon FoxMeyer, a totally unrelated entity, than would have been granted to the bankrupt debtor itself?

The effect of the stay is found in its name. Proceedings are *stayed*, not dismissed. As noted in *Pope v. Manville Forest Products*, 778 F.2d 238, 239 (5th Cir. 1985):

We recognize that the stay, by its statutory words, operates against "the commencement or continuation" of judicial proceedings. No specific reference is made to "dismissal" of judicial

proceedings. Nevertheless, it seems to us that ordinarily the stay must be construed to apply to dismissal as well. First, if either of the parties takes any step to obtain dismissal, such as motion to dismiss or motion for summary judgment, there is clearly a continuation of the judicial proceeding. Second, in the more technical sense, just the entry of an order of dismissal, even if entered sua sponte, constitutes a judicial act toward the disposition of the case and hence may be construed as a "continuation" of a judicial proceeding. Third, dismissal of a case places the party dismissed in the position of being stayed "to continue the judicial proceeding," thus effectively blocking his right to appeal. Thus, absent the bankruptcy court's lift of the stay, or perhaps a stipulation of dismissal, a case such as the one before us must, as a general rule, simply languish on the court's docket until final disposition of the bankruptcy proceeding. * * *

The plaintiff has not stipulated to a dismissal of this action. The plaintiff has repeatedly requested a trial, and this case was properly remanded to the district court for a trial.

CONCLUSION

For the foregoing reasons, the petition for the issuance of a writ of certiorari should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that I forwarded copies of the foregoing response by United States mail addressed to Mr. Drew Heard at Shank, Irwin, Conant, Lipshy & Casterline, 2100 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201-3320 on the 11th day of December, 1989.

Stanley D. Rauls

